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# Aquamar v. Del Monte Fresh Produce: Expanding the Scope of Ambassadors' Rights under the Foreign Sovereign Immunities Act

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# Aquamar v. Del Monte Fresh Produce: Expanding the Scope of Ambassadors' Rights under the Foreign Sovereign Immunities Act

## **Cover Page Footnote**

International Law; Commercial Law; Law

# ***Aquamar v. Del Monte Fresh Produce: Expanding the Scope of Ambassadors' Rights Under the Foreign Sovereign Immunities Act***

## **I. Introduction**

In 1974, the Foreign Sovereign Immunities Act (FSIA)<sup>1</sup> was enacted so that U.S. citizens could seek legal redress against foreign states in certain circumstances.<sup>2</sup> In particular, the FSIA provides that where a foreign government (or governmental entity) is involved in legal proceedings and expressly waives its sovereign immunity, U.S. courts may thereafter exercise subject matter jurisdiction over that foreign government.<sup>3</sup> However, the legislative history of the FSIA has remained noticeably silent as to who has authority to waive sovereign immunity before U.S. courts and as to which particular body of law—state, federal, international, or foreign—governs the matter.<sup>4</sup> The Eleventh Circuit gave extensive treatment to these issues in *Aquamar S.A. v. Del Monte Fresh Produce N.A.*<sup>5</sup> In reversing the federal district court, the Eleventh Circuit applied federal and international law to hold that, under the FSIA, an ambassador has the authority to waive expressly his or her sovereign's immunity, "absent compelling evidence making it 'obvious' that he or she does not."<sup>6</sup>

Part II of this Note outlines the facts, case history, and conclusions of both the federal district court and the federal court

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<sup>1</sup> 28 U.S.C. § 1605 (1999).

<sup>2</sup> See *Jurisdiction of U.S. Courts in Suits Against Foreign States, 1976: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the Comm. on the Judiciary, 94<sup>th</sup> Cong., 2d Sess. 24 (1976)* (statement of Monroe Leigh, Legal Adviser, U.S. Department of State).

<sup>3</sup> § 1605(a)(1).

<sup>4</sup> See H.R. Rep. No. 94-1487, at 18 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6617.

<sup>5</sup> 179 F.3d 1279 (11th Cir. 1999).

<sup>6</sup> *Id.* at 1299.

of appeals regarding an ambassador's power to effectuate an express waiver of sovereign immunity under the FSIA.<sup>7</sup> Part III of this Note illustrates the relevant historical evolution of sovereign immunity doctrine in the United States, emphasizing the waiver provision of the FSIA.<sup>8</sup> Part IV of this Note reviews the reasoning of the Eleventh Circuit and examines the possible sociopolitical ramifications of the court's decision.<sup>9</sup> Finally, this Note attempts to reconcile the consequences and policy concerns of the *Aquamar* decision.<sup>10</sup>

## II. Statement of the Case

### A. *The Facts and Procedural History*

In 1995 the plaintiffs, commercial shrimp farmers in Ecuador, commenced a series of actions in Florida state court against Del Monte Fresh Produce Company and others.<sup>11</sup> The plaintiffs alleged that fungicides and herbicides, produced or supplied by the defendants, and used on Ecuadoran banana farms, had killed their shrimp.<sup>12</sup> In response, the defendants filed third-, fourth-, and fifth-party complaints against Programa Nacional de Banano (PNB), an agency within the Ecuadoran Ministry of Agriculture and Livestock.<sup>13</sup> After removing the cases to federal court pursuant to 28 U.S.C. § 1441(d),<sup>14</sup> PNB joined in defendants' motion to dismiss the actions on the grounds of forum non conveniens.<sup>15</sup>

The plaintiffs moved to strike the complaints against PNB urging that the district court had no jurisdiction over PNB because, as an agency of the Republic of Ecuador, it was immune from suit

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<sup>7</sup> See *infra* notes 11-54 and accompanying text.

<sup>8</sup> See *infra* notes 55-107 and accompanying text.

<sup>9</sup> See *infra* notes 108-46 and accompanying text.

<sup>10</sup> See *infra* notes 147-49 and accompanying text.

<sup>11</sup> See *Aquamar*, 179 F.3d at 1282.

<sup>12</sup> See *id.*

<sup>13</sup> See *id.*

<sup>14</sup> 28 U.S.C. § 1441(d) (1999). Federal subject matter jurisdiction was based solely on PNB's presence under 28 U.S.C. § 1330(a) (1999), which grants federal courts jurisdiction over foreign states and their relevant agencies. See *id.*

<sup>15</sup> See *Aquamar*, 179 F.3d at 1282.

under the FSIA.<sup>16</sup> Thereafter, PNB made numerous attempts to waive its immunity so that the case would remain in federal court.<sup>17</sup> When PNB's legal counsel failed to accomplish this with a written waiver of immunity filed on behalf of their clients, PNB offered the affidavit of Edgar Teran, Ecuador's ambassador to the United States, which purported to do the same.<sup>18</sup> Plaintiffs in turn questioned whether the Ambassador had the authority to waive PNB's sovereign immunity.<sup>19</sup> The district judge requested that the parties supplement the record so that he could "become informed of the relevant provisions of Ecuadoran law, determine precisely what is required for an effective waiver of sovereign immunity under that law, and examine the record to determine if there has been an effective waiver."<sup>20</sup> In addition to the opinion of an Ecuadoran legal expert, PNB submitted the affidavit of Sixto Duran Ballen, President of the Republic of Ecuador, which ratified

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<sup>16</sup> See *id.* (citing 28 U.S.C. § 1605 (1999)). The Court of Appeals noted:

[A] typical sovereign immunity inquiry pits a defendant attempting to claim immunity against a plaintiff who argues that an exception to immunity applies. This case presented the district court with more unusual circumstances: the plaintiffs claimed that sovereign immunity existed, while representatives of the foreign sovereign defendant, PNB, claimed that it did not.

*Id.*

<sup>17</sup> See *id.* at 1283.

<sup>18</sup> The affidavit stated in part:

I [Teran] respectfully waive PNB's sovereign immunity on behalf of PNB and the Government of Ecuador on the following limited basis. Without waiving any other defense of law or fact to the claims asserted against it in this litigation, PNB hereby and for the purposes of these litigations only and in connection with the pending forum non conveniens motions (1) explicitly waives its immunity from the jurisdiction of this Court pursuant to 28 U.S.C. § 1605(a)(i) and consents to the exercise of personal jurisdiction by this Court over PNB.

*Id.* at 1283. Teran further stated that the purpose of the waiver was to secure a forum non conveniens dismissal in federal court:

The decision by the Ecuadoran government to submit to the court's jurisdiction in connection with these cases was not made lightly but is a recognition of the fundamental seriousness with which the Ecuadoran Government defends its sovereignty over its environment and use of natural resources . . . according to Ecuadoran law, conditions relating to the environment . . . belong to the sovereignty of each state.

*Id.*

<sup>19</sup> See *id.* at 1283.

<sup>20</sup> *Id.* at 1283-84.

the statements made in Teran's affidavit.<sup>21</sup> Plaintiffs countered with the affidavits of Ecuadoran legal experts and government officials arguing that (1) the Attorney General of Ecuador was granted the sole authority to act in judicial matters; (2) the Ecuadoran Constitution forbade the waiving of Ecuador's sovereign immunity; and (3) Ambassador Teran had ulterior motives for waiving PNB's sovereign immunity.<sup>22</sup>

The district court determined that PNB had failed to effectuate a proper waiver of its sovereign immunity and dismissed the complaints against PNB.<sup>23</sup> The court reasoned that Ambassador Teran's affidavit was "expressly limited to the litigation of the forum non conveniens motion now pending" and President Ballen's affidavit was "similarly qualified."<sup>24</sup> Accordingly, the court held that "no representative of the Republic of Ecuador ha[d] ever purported to waive the immunity of the Republic with respect to the third, fourth, and fifth party claims against PNB."<sup>25</sup> Because PNB was no longer a party to the action, the district court was without subject matter jurisdiction and it therefore remanded the cases to state court.<sup>26</sup>

Upon return to the Florida state court, the defendants—this time without PNB—again moved for a forum non conveniens dismissal that was denied by the trial court.<sup>27</sup> In 1997 the Florida Court of Appeals reversed the decision, ruling that the Ecuadoran courts were an appropriate alternative forum, and directed the trial court to dismiss the cases on the grounds of forum non conveniens.<sup>28</sup> Thereafter, the Ecuadoran courts refused to accept jurisdiction over the cases and the Florida trial court intimated that it might consider reinstating them.<sup>29</sup> The defendants/appellants

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<sup>21</sup> See *id.* at 1284. President Ballen's affidavit stated in part: "I . . . know what Ambassador Teran has already stated, and I ratif[y] his statement as the priority policy of the Republic of Ecuador is that these matters . . . should be decided within the Ecuadoran forum." *Id.*

<sup>22</sup> See *id.*

<sup>23</sup> See *id.*

<sup>24</sup> *Id.*; see also *supra* note 8 and accompanying text.

<sup>25</sup> *Aquamar*, 179 F.3d at 1284.

<sup>26</sup> See *id.*

<sup>27</sup> See *id.*

<sup>28</sup> See *id.*

<sup>29</sup> See *id.* at 1285.

petitioned the Eleventh Circuit to reverse the federal district court's dismissal of the claims against PNB and to return the cases to federal court.<sup>30</sup>

*B. The Eleventh Circuit Court of Appeals Decision*

After determining that it had jurisdiction to hear the appeal,<sup>31</sup> the Eleventh Circuit conducted a *de novo* review of the district court's decision to dismiss the claims against PNB for lack of subject matter jurisdiction.<sup>32</sup> The court noted that PNB, as an agency of the Republic of Ecuador, would be treated as a foreign state for the purposes of the FSIA and as such was "immune from the jurisdiction of the United States unless an FSIA statutory exemption [was] applicable."<sup>33</sup> The court determined that, on appeal, the only relevant exception to the FSIA was the express waiver of immunity provision under § 1605(a)(1) of the Act.<sup>34</sup> The Court of Appeals then turned to Ambassador Teran's affidavit and the documents filed by PNB's legal counsel to determine if any of those items constituted an express waiver of immunity.<sup>35</sup>

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<sup>30</sup> *See id.* In all likelihood, the defendants, Del Monte and others believed that if the Florida trial court were to handle their case again, they would be held liable. Thus, the defendants perhaps wanted to bring PNB back into the case at the federal court level so that at least some of that possible liability could be shared with PNB.

<sup>31</sup> *See id.*

<sup>32</sup> *See id.* at 1289. Note that "the existence of subject matter jurisdiction under the FSIA is a question of law subject to *de novo* review." *Export Group v. Reef Indus., Inc.*, 54 F.3d 1466, 1469 (9th Cir. 1995).

<sup>33</sup> *Aquamar*, 179 F.3d at 1290 (quoting *Honduras Aircraft Registry, Ltd. v. Gov't of Honduras*, 129 F.3d 543, 546 (11th Cir. 1997)).

<sup>34</sup> *See id.* Section 1605(a)(1) of the FSIA provides that

[A] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which the foreign state has waived its immunity either *explicitly* [emphasis added] or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver[.]

*Id.* The court determined that PNB had not waived its immunity by implication because "PNB never filed a responsive pleading, and its other participation in the litigation, such as removing the cases to federal court, filing statements of position, and joining the forum non conveniens motion, did not constitute an implicit waiver." *Id.* The court also dismissed application of the "commercial activity" exception set forth in 28 U.S.C. § 1605(a)(2) because the defendants/appellants did not claim that exception as applicable to their case. *See id.*

<sup>35</sup> *See id.* at 1291.

As to the statements of PNB's lawyers, the court rejected plaintiffs' argument that a document signed only by a private attorney is never sufficient to waive the immunity of that attorney's sovereign client.<sup>36</sup> The court cited congressional intent and several cases to support its conclusion that a private attorney may expressly waive the sovereign immunity of his or her client.<sup>37</sup> Yet, because the statements in this case were not "clear, complete, unambiguous, and unmistakable" manifestations of PNB's intent to waive its immunity,<sup>38</sup> the court held that the statements did not expressly waive immunity.<sup>39</sup> As to Ambassador Teran's affidavit, the court decided that the affidavit's language was "sufficiently complete" to effect a waiver of PNB's sovereign immunity.<sup>40</sup> The court reasoned that the word "only" in the phrase "for the purposes of these litigations *only* and in connection with the pending forum non conveniens motions," modified "these litigations" but did not modify "in connection with the . . . motions."<sup>41</sup> Therefore, the court held that Teran had not only limited his waiver to the forum non conveniens motions but had also waived PNB's immunity in regards to the third, fourth, and fifth party claims against them.<sup>42</sup>

The Eleventh Circuit next addressed the district court's

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<sup>36</sup> *See id.*

<sup>37</sup> *See id.* Because Congress had deemed a responsive pleading which failed to raise the FSIA defense an implicit waiver (when filed by a private attorney representing a foreign state), the Eleventh Circuit assumed that Congress intended that the same attorney could use an express waiver to reach the same result. *See id.* (citing *Hercaire Int'l, Inc. v. Argentina*, 821 F.2d 559, 561, 563 (11th Cir. 1987)).

<sup>38</sup> *Id.* at 1292 (quoting *Aquinda v. Texaco*, 175 F.R.D. 50, 52 (S.D.N.Y. 1997)).

<sup>39</sup> *See id.* at 1292. "Read literally, [counsel's statement] does not purport to waive Ecuador's immunity, but merely states the PNB lawyers' opinion that Ecuador either had filed an explicit waiver of immunity or planned to file one at some point. An express waiver must be more exact than this." *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 1293 (emphasis added).

<sup>42</sup> *See id.* The court pointed to Teran's second and final affidavit that stated Teran intended his first affidavit "to waive the immunity of the Republic with respect to third, fourth, and fifth party claims against PNB" as confirmation of their conclusion. *Id.* In ruling on this particular issue, the court noted that "nothing in the FSIA prohibits a foreign sovereign from effecting a waiver of immunity for strategic purposes." *Id.* The court added that it "need not approve the reasons underlying a foreign state's waiver of its immunity; indeed, to second-guess motivations and litigation strategy might signal a disrespect for a sovereign's autonomy that is at odds with the policies underlying the FSIA." *Id.*



contention that Ecuadoran law should dictate who and what is required for the issuance of an effective waiver of Ecuador's immunity. Because the FSIA and its legislative history are silent on whether federal or state law resolves the issue, the court relied on congressional policy, related case law, and its own interpretation of the FSIA.<sup>43</sup> The court concluded that when "a duly accredited head of a diplomatic mission—such as an ambassador—files a waiver of his or her sovereign's immunity in a judicial proceeding, the court should assume that the sovereign has authorized the waiver absent extraordinary circumstances."<sup>44</sup> The court supported its conclusion by turning to relevant principles of international law.<sup>45</sup> Relying again on a number of sources, including the Vienna Convention on Diplomatic Relations,<sup>46</sup> the Restatement (Third) of the Foreign Relations Law of the United States,<sup>47</sup> and the International Court of Justice Rules of Court,<sup>48</sup> the court found that diplomatic representatives are authorized to waive their countries' immunity for the purposes of

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<sup>43</sup> See *id.*

<sup>44</sup> *Id.* at 1294. The Supreme Court's decision in *First Nat'l City Bank v. Banco Para El Comercio Exterior*, 462 U.S. 611 (1983), was of central importance to the Eleventh Circuit's decision to apply a federal rule, rather than look to state law. See *id.* In *First Nat'l City Bank*, the Supreme Court stated that the FSIA "was not intended to affect the substantive law determining the liability of a foreign state or instrumentality ... where state law provides a rule of liability governing private individuals, the FSIA requires the application of that rule to foreign states in like circumstances." *Id.* at 622 n.11. The Eleventh Circuit reasoned that the effectiveness of an express waiver under § 1605(a)(1) was not a question of liability and was therefore controlled by federal law. See *Aquamar*, 179 F.3d at 1293.

<sup>45</sup> See *Aquamar*, 179 F.3d at 1294. The Eleventh Circuit stated several reasons for doing so. *Id.* "First, Congress intended international law to inform the courts in their reading of the [FSIA's] provisions." *Id.* "Second, the FSIA's purposes included 'promot[ing] harmonious international relations' and according foreign sovereigns treatment in U.S. courts that is similar to the treatment the United States would prefer to receive in foreign courts." *Id.* (citing *Williams v. Shipping Corp. of India*, 489 F.Supp. 526, 528 (E.D. Va. 1980)).

<sup>46</sup> See Vienna Convention on Diplomatic Relations, Apr. 18, 1961, preamble, 23 U.S.T. 3227, 500 U.N.T.S. 95.

<sup>47</sup> See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 311 cmt. b (1986).

<sup>48</sup> See Rules of Court, art. 38, 1978 P.C.I.J. 976 (authorizing diplomatic representatives to bring applications before the Court on behalf of their countries).

pending judicial proceedings.<sup>49</sup> The court pointed to the frustration of justice and the disruption of foreign relations as reasons to avoid inquiries into a sovereign's local law.<sup>50</sup>

The court qualified the presumption that an ambassador has the authority to waive his or her sovereign's immunity. It held that such authority does not exist when there is "compelling evidence making it 'obvious'" that the ambassador is manifestly contradicting his or her sovereign.<sup>51</sup> After examining Ambassador Teran's course of conduct and the opinions of Ecuadoran legal authorities, the court found no "obvious" evidence that Teran lacked authority to waive PNB's sovereign immunity.<sup>52</sup> Therefore, the court concluded that the federal district court erred in failing to accept jurisdiction over PNB and reversed the decision to dismiss PNB.<sup>53</sup> The court vacated the district court's order remanding the case to state court and then remanded the case to the district court for further proceedings.<sup>54</sup>

### III. Background Law

#### A. *A Brief History of the Foreign Sovereign Immunities Act of 1976*

In the early nineteenth century, U.S. federal courts adhered to the absolute theory of sovereign immunity, which shielded foreign states from all possible suits in American courts.<sup>55</sup> More a

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<sup>49</sup> See *Aquamar*, 179 F.3d at 1296, 1297.

<sup>50</sup> See *id.* at 1298.

<sup>51</sup> *Id.* at 1299. "Our review of international law supports the conclusion that an ambassador's statements may so plainly contradict the position of his sovereign that they do not bind the sovereign." *Id.*

<sup>52</sup> See *id.* at 1300. Plaintiffs submitted the opinions of Ecuadorian legal authorities. See *id.*

<sup>53</sup> See *id.*

<sup>54</sup> See *id.*

<sup>55</sup> See *The Schooner Exch. v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812). Chief Justice Marshall argued that because all sovereigns possess "equal rights and equal independence" under international law, a sovereign enters the territory of a friendly foreign government "in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication and will be extended to him." *Id.* at 136-37. *The Schooner Exchange* involved a foreign military vessel, but over 100 years later the Supreme Court expanded the scope of immunity to include commercial vessels of a foreign state. See *Berizzi Bros. Co. v. S.S. Pesaro*, 271

diplomatic than a judicial concept,<sup>56</sup> this theory of immunity caused significant hardships for U.S. citizens involved in contracts with foreign entities and U.S. victims of torts committed by foreign states.<sup>57</sup> Gradually, the courts became uneasy with the absolute theory, which not only deprived citizens of legal remedies against foreign governments, but also served to increase the commercial advantages of those governments.<sup>58</sup> In 1952, the U.S. Department of State issued a letter, known as the "Tate Letter," which purported to adopt a legal standard known as the restrictive theory of sovereign immunity.<sup>59</sup> Fueled by the inequities of the absolute theory, the Tate Letter recommended that courts grant immunity to foreign states only for their public actions and not for actions arising out of entirely commercial or private acts.<sup>60</sup>

Nonetheless, the Tate Letter indicated that the State Department, an executive branch department, would continue to issue the recommendations relating to sovereign immunity.<sup>61</sup> This situation presented a number of problems that were confounded by the inconsistent application of the policies articulated in the Tate Letter.<sup>62</sup> For example, the Supreme Court in *Verlinden B.V. v.*

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U.S. 562 (1926) (holding that the principles of sovereign immunity are applicable to commercial ships because those ships advance trade and produce revenue on behalf of their governments).

<sup>56</sup> See Matthew P. McGuire, Note, *Direct Effect Jurisdiction in the 90's: "Weltover, Inc. v. Republic of Argentina" and a Broad Interpretation of the Foreign Sovereign Immunities Act of 1976*, 17 N.C. J. INT'L L. & COM. REG. 383, 389 (1992).

<sup>57</sup> See William R. Dorsey, III, *Reflections on the Foreign Sovereign Immunities Act After Twenty Years*, 28 J. MAR. L. & COM. 257, 258 (1997).

<sup>58</sup> See Stella Havkin, Note, *The Foreign Sovereign Immunities Act: The Relationship Between the Commercial Activity Exception and the Noncommercial Tort Exception in Light of De Sanchez v. Banco Central de Nicaragua*, 10 HASTINGS INT'L & COMP. L. REV. 455, 459 (1987).

<sup>59</sup> See Letter from Jack B. Tate, Acting Legal Adviser, Department of State to Acting Attorney General Philip B. Perlman (May 19, 1952), reprinted in 26 Dep't St. Bull. 984-85 (1952), and in *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682 (1976) (appendix to opinion of White, J.).

<sup>60</sup> See *id.*

<sup>61</sup> See *id.*

<sup>62</sup> See H.R. Rep. No. 94-1487, at 8 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6607. The legislative history of the FSIA states that:

From a legal standpoint, if the [U.S. State] Department applies the restrictive principle in a given case, it is in the awkward position of a political institution trying to apply a legal standard to litigation already before the courts.

*Central Bank of Nigeria*<sup>63</sup> recognized that "foreign nations often placed diplomatic pressure on the State Department in seeking immunity. On occasion, political considerations led to suggestions of immunity in cases where immunity would not have been available under the restrictive theory."<sup>64</sup> Furthermore, despite the fact that the State Department rarely declared its rationale for its decisions, there was no published case law to guide the courts in challenging a State Department recommendation.<sup>65</sup> Both courts and litigants dealt with an unpredictable methodology whenever sovereign immunity was at issue.<sup>66</sup>

By enacting the FSIA, Congress sought to codify a legal means of redress for U.S. citizens against foreign states in certain circumstances.<sup>67</sup> The newly created FSIA shifted power away from the State Department and vested the judiciary with the authority to rule on the issue of sovereign immunity.<sup>68</sup> Congress intended the courts to develop a uniform body of law under the FSIA that, for the first time, established a statutory scheme defining subject matter and personal jurisdiction over foreign states.<sup>69</sup> Congress envisioned that this body of law would: (1) eliminate the specter of favoritism that hung over sovereign immunity decisions;<sup>70</sup> (2) bring the United States into conformity

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Moreover, it does not have the machinery to take evidence, to hear witnesses, or to afford appellate review.

*Id.*

<sup>63</sup> 461 U.S. 480 (1983).

<sup>64</sup> *Id.* at 488.

<sup>65</sup> See Havkin, *supra* note 58, at 462.

<sup>66</sup> See Dorsey, *supra* note 57, at 260.

<sup>67</sup> See *Jurisdiction of U.S. Court in Suits Against Foreign States, 1976: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the Comm. on the Judiciary, 94<sup>th</sup> Cong., 2d Sess. 24 (1976)* (statement of Monroe Leigh, Legal Advisor, U.S. Department of State).

<sup>68</sup> See H.R. Rep. No. 94-1487, at 8 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6606.

<sup>69</sup> See *Goar v. Compania Peruana de Vapores*, 688 F.2d 417, 420 (5th Cir.1982) (stating that "Congress chose to treat jurisdiction of actions against foreign sovereigns in a uniform and comprehensive manner"); see also *Williams v. Shipping Corp. of India*, 653 F.2d 875, 879 (4th Cir. 1981) *cert. denied*, 455 U.S. 982 (1982) (stating that "[b]oth the statutory language and the legislative history evince the congressional desire to achieve uniformity of decisional law in the area of suits against foreign sovereigns").

<sup>70</sup> H.R. Rep. No. 94-1487, at 12, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6611. The legislative history recognizes that the "broad jurisdiction in the Federal courts should be

with sovereign immunity practices of other nations;<sup>71</sup> and (3) provide clear notice to foreign states regarding the application of the immunity defense in U.S. courts.<sup>72</sup> This notice is particularly relevant for foreign states that base their own sovereign immunity doctrines on reciprocity.<sup>73</sup> Reciprocity requires a state to grant sovereign immunity in its courts to a defendant if the courts of the defendant foreign state would likewise grant immunity.<sup>74</sup>

Despite its lofty goals, the FSIA is widely criticized in the courts and academic commentaries as being poorly drafted and overly complex.<sup>75</sup> One court described the FSIA as a "labyrinth" that, because of its "bizarre structure and its many deliberately vague provisions, has during its brief lifetime been a financial boon for the private bar but a constant bane of the federal judiciary."<sup>76</sup> As a result, lawyers have had to "rely on their wits" while U.S. courts attempt to further develop and clarify the law as it relates to the FSIA.<sup>77</sup>

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conducive to uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences." *Id.*

<sup>71</sup> See *Von Dardel v. U.S.S.R.*, 623 F. Supp. 246, 253 (D.D.C. 1985) (maintaining that "[t]he Foreign Sovereign Immunities Act, like every federal statute, should be interpreted in such a way as to be consistent with the law of nations.").

<sup>72</sup> See H.R. Rep. No. 94-1487, at 12, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6609.

<sup>73</sup> See MARJORIE M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* § 20, at 580-84 (1968).

<sup>74</sup> See *Williams v. Shipping Corp. of India*, 489 F. Supp. 526, 528 (E.D. Va. 1980) (stating that "a foreign nation is being accorded the same type . . . of reciprocal immunity we would like to be accorded in a foreign court"), *aff'd*, 653 F.2d 875 (4th Cir.1981), *cert. denied*, 455 U.S. 982 (1982).

<sup>75</sup> See Victoria A. Carter, Note, *God Save the King: Unconstitutional Assertions of Personal Jurisdiction over Foreign States in U.S. Courts*, 82 VA. L. REV. 357, 360 (1996).

<sup>76</sup> *Gibbons v. Udaras na Gaeltachta*, 549 F. Supp. 1094, 1105 (S.D.N.Y. 1982); *see, e.g., Vencedora Oceanica Navigacion v. Compagnie Nationale Algerienne De Navigation*, 730 F.2d 195, 205 (5th Cir. 1984) (Higginbotham, J., concurring in part and dissenting in part) (stating that the FSIA "presents a peculiarly twisted exercise in statutory draftsmanship"); *Texas Trading & Milling Corp. v. Federal Rep. of Nig.*, 647 F.2d 300, 307 (2d Cir. 1981) (calling the FSIA a "Gordian knot"), *cert. denied*, 454 U.S. 1148 (1982).

<sup>77</sup> Gary B. Sullivan, *Implicit Waiver of Sovereign Immunity by Consent to Arbitration: Territorial Scope and Procedural Limits*, 18 TEX. INT'L L.J. 329, 329 (1983).

*B. Waiver and Power to Waive Under the FSIA*

The FSIA provides that courts have subject matter jurisdiction over an action only if it falls within an exception to immunity.<sup>78</sup> The exceptions include express or implicit waivers of immunity,<sup>79</sup> suits involving commercial activity,<sup>80</sup> and suits involving personal injury, death, or damage to or loss of property.<sup>81</sup> As to implicit waivers of immunity, the House Report on the FSIA instructs the courts to find waivers where foreign states have agreed to arbitration in another country, agreed that the law of a particular country should govern a contract, or filed an answer without raising the sovereign immunity defense.<sup>82</sup> However, when express waivers are involved, the FSIA is awkwardly silent on which persons or bodies have authority to waive immunity before U.S. courts.<sup>83</sup> The legislative history specifies that "since the sovereign immunity of a political subdivision, agency or instrumentality of a foreign state derives from the foreign state itself, the foreign state may waive the immunity of its political subdivisions, agencies or instrumentalities."<sup>84</sup> Nonetheless, this observation does not

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<sup>78</sup> See *Verlinden B.V. v. Central Bank of Nig.*, 461 U.S. 480, 484 (1983). In *Verlinden*, the Supreme Court held that "if none of the exceptions to sovereign immunity set forth in the Act applies, the District Court lacks both statutory subject matter jurisdiction and personal jurisdiction." *Id.* at 485 n.5. "The formula of § 1605's exceptions simultaneously serve three functions in litigation against foreign states: they grant personal jurisdiction, grant subject matter jurisdiction, and deny immunity." *Id.* at 488-90.

<sup>79</sup> See 28 U.S.C. § 1605(a)(1) (1988). Of all the exceptions, the "commercial activity" exception has seen the most litigation in U.S. courts. See *Dorsey*, *supra* note 57, at 264. The issue of whether an activity is "commercial" under § 1605(a)(2) has been a source of debate since the enactment of the FSIA. See *Export Group v. Reef Indus., Inc.*, 54 F.3d 1466 (9th Cir. 1995). This Note concerns only the express waiver exception to sovereign immunity.

<sup>80</sup> See 28 U.S.C. § 1605(a)(2) (1999).

<sup>81</sup> See § 1605(a)(5).

<sup>82</sup> H.R. Rep. No. 94-1487, at 18 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6617. Though the House Report has not been consistently followed, the courts have construed the implicit waiver provision very narrowly, typically refusing to find an implicit waiver where the purported waiver does not fall into one of the three situations outlined in the legislative history. See *Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1017 (2d Cir. 1991).

<sup>83</sup> See H.R. Rep. No. 94-1487, at 18 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6617.

<sup>84</sup> *Id.*

resolve the specific questions as to *who* may waive a sovereign's immunity—or the immunity of that sovereign's agencies or instrumentalities<sup>85</sup>—and what law dictates what constitutes an effective authoritative waiver of immunity.

Since the enactment of the FSIA, the question of who has the authority to waive a sovereign's immunity has rarely been litigated in U.S. courts, so case law remains relatively undeveloped in this area. While it has been held that a sovereign's counsel can *waive* his or her sovereign's immunity, provided that certain requirements are met,<sup>86</sup> a sovereign's counsel is generally unable to *invoke* immunity on behalf of the foreign client.<sup>87</sup>

In the case of ambassadors and other diplomatic agents, "public officers" by definition,<sup>88</sup> FSIA matters are initially complicated by issues of international law, foreign policy, and judicial comity.<sup>89</sup> When an ambassador purports to waive his sovereign's immunity, courts must first decide whether to analyze the agency relationship according to federal, state, or local foreign law.<sup>90</sup> Specific problems may arise in cases where the laws of a

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<sup>85</sup> Cf. The State Immunity Act, § 2(7), c.33, (1978) (U.K.). Note:

The head of a state's diplomatic mission in the United Kingdom, or the person for the time being performing his functions, shall be deemed to have authority to submit on behalf of the State in respect of any proceedings; and any person who has entered into a contract on behalf of and with the authority of a State shall be deemed to have authority to submit on its behalf in respect of proceedings arising out of the contract.

*Id.*

<sup>86</sup> See *Hercaire Int'l Inc. v. Argentina*, 821 F.2d 559, 561 (11th Cir. 1987) (treating statement included an answer and counterclaim as an "express waiver") (emphasis added); see also *Sotheby's, Inc. v. Garcia*, 802 F. Supp. 1058, 1063 (S.D.N.Y. 1992) (finding that a memorandum of law and affirmation of counsel expressly waived Republic of the Philippines' sovereign immunity). In *Maritime Ventures Int'l, Inc. v. Caribbean Trading & Fidelity, Ltd.*, 722 F.Supp. 1032 (S.D.N.Y. 1989), "the court stated that Congress . . . intended to restrict corporations and individuals more stringently from invoking the protective veil of sovereign immunity than it did to limit their ability to waive immunity on behalf of the government for whom they served as a private agent." *Id.* at 1038.

<sup>87</sup> See *United States of Mexico v. Rask*, 118 Cal. App. 21 (Cal. Dist. Ct. App. 1931) (emphasis added).

<sup>88</sup> BLACK'S LAW DICTIONARY 79 (6th ed. 1990).

<sup>89</sup> See *Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279 (11th Cir. 1999).

<sup>90</sup> See *id.*; *First Fidelity Bank, N.A. v. The Gov't of Antigua & Barbuda*—

foreign country explicitly prevent any waiver of sovereign immunity by the foreign government, or where those laws assign waiver authority to a specified few.<sup>91</sup> If the court decides to exercise subject matter jurisdiction over the issue, it must then create and apply a rule that governs the scope of an ambassador's authority without outwardly disrespecting the sovereign's right to regulate its own affairs.<sup>92</sup>

In *First Fidelity Bank, N.A. v. Government of Antigua & Barbuda*,<sup>93</sup> the Second Circuit Court of Appeals began developing an approach to the unique concerns related to ambassadorial waivers of immunity under the FSIA. *First Fidelity* involved an ambassador to the United Nations from Antigua & Barbuda who borrowed \$250,000 from a commercial lender—ostensibly for the purpose of renovating his country's permanent mission in New York City.<sup>94</sup> The ambassador signed the loan agreement with First Fidelity in his capacity as ambassador to the United Nations but thereafter used the money for personal purposes.<sup>95</sup> After the ambassador ceased repayment on the loan, plaintiff initiated suit against the single Government of Antigua & Barbuda.<sup>96</sup> Nine months after a default judgment was entered in favor of the plaintiff, the ambassador and the bank entered into a settlement agreement in which the ambassador, acting on behalf of the government, waived the defense of sovereign immunity.<sup>97</sup> The ambassador defaulted on the settlement agreement which, in turn, prompted the bank to seek attachment of the accounts of the government.<sup>98</sup> In defending against the attachment, the government moved to dismiss the case for lack of subject matter

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Permanent Mission, 877 F.2d 189 (2d Cir. 1989).

<sup>91</sup> See George Kahale, *Immunity and Jurisdiction: Toward a Uniform Body of Law in Actions Against Foreign States*, 18 COLUM. J. TRANSNAT'L L. 211, 231-232 (1979).

<sup>92</sup> See GARY B. BORN, *INTERNATIONAL CIVIL LITIGATION IN THE UNITED STATES COURTS* 710 (3d ed. 1996) (discussing the implications of the act of state doctrine to the actions of foreign government officials).

<sup>93</sup> 877 F.2d 189 (2d Cir. 1989).

<sup>94</sup> See *id.* at 191-192.

<sup>95</sup> See *id.* at 197 (Newman, J., dissenting).

<sup>96</sup> See *id.* at 194.

<sup>97</sup> See *id.* at 191. The agreement was also signed by an individual claiming to be the attorney for the Government of Antigua & Barbuda. See *id.*

<sup>98</sup> See *id.*



jurisdiction under the FSIA.<sup>99</sup> The government argued that it was not bound by the ambassador's acts because they were beyond the scope of his authority.<sup>100</sup> The district court denied the motion and the government appealed.<sup>101</sup>

On appeal, the issue was whether the ambassador possessed the requisite authority to borrow money and to waive sovereign immunity on behalf of his government.<sup>102</sup> The bank argued that the ambassador possessed either actual or apparent authority to bind his government to the loan agreement and the waiver, because of his high diplomatic standing.<sup>103</sup> The court rejected this broad view of authority and instead discussed the powers of diplomatic officials as an issue of agency.<sup>104</sup> The court concluded that it would apply the agency law of New York to the government-ambassador relationship.<sup>105</sup> The court cited the Supreme Court in *First National City Bank v. Banco Para El Comercio Exterior de Cuba* ("Bancec") for the proposition that the FSIA does not affect the substantive law determining the liability of a foreign state.<sup>106</sup> The court held that the ambassador's title alone was not sufficient to bind the government. Rather, his position was an element to be weighed in determining whether the bank had been reasonable in relying on the authority under New York agency law.<sup>107</sup>

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<sup>99</sup> *See id.*

<sup>100</sup> *See id.*

<sup>101</sup> *See id.*

<sup>102</sup> *See id.* at 190-91.

<sup>103</sup> *See id.*

<sup>104</sup> *See id.* at 192-94.

<sup>105</sup> *See id.* at 193. The court held that "[t]he facts of a given case must be examined, and the agency law of developed states, here our own, provides the proper framework for the examination." *Id.*

<sup>106</sup> *See id.* at 194 n.3 (citing *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 620-621 (1983)).

<sup>107</sup> *See id.* at 194. In his dissent, Judge Newman was primarily concerned with the ramifications of the majority's choice of law determination. *Id.* at 197 (Newman, J., dissenting). Judge Newman stated that:

[t]hrough foreign states, if amenable to suit in this country, may, in most circumstances, be obliged to accept state substantive law that normally applies to such matters as contracts and creditors' rights, they are entitled to expect that this country will have a uniform body of federal law that determines those issues of agency law that implicate relationships between a foreign government

#### IV. Significance of the Case

At the outset of *Aquamar*, the Eleventh Circuit acknowledged that “novel issues” relating to the waiver provisions of the FSIA had been raised by the appeal.<sup>108</sup> Indeed, the jurisprudential landscape behind the express waiver provision—particularly ambassadorial powers under that provision—is sparsely populated.

##### *A. The Decision Whether to Apply Federal or State “Choice of Law” Rules*

In *Aquamar*, the federal district court and then the Eleventh Circuit sought to determine whether Edgar Teran, as ambassador for the Republic of Ecuador, could waive the sovereign immunity of an Ecuadoran government agency.<sup>109</sup> This question is governed by the FSIA, but neither the language of the FSIA nor its legislative history define with certainty “whether federal or state law controls questions relating to the authority of a person who purports to waive the immunity of a foreign sovereign under the FSIA.”<sup>110</sup> Consequently, the Eleventh Circuit had to determine whether to apply state or federal law under the FSIA.<sup>111</sup>

The Eleventh Circuit turned to the Supreme Court’s ruling in *First National City Bank v. Banco Para El Comercio Exterior*<sup>112</sup> in which the Court held that “where state law provides a rule of liability governing private individuals, the FSIA requires the application of that rule to foreign states in like circumstances.”<sup>113</sup> The Eleventh Circuit held that federal law controlled because the effectiveness of an express waiver under the FSIA was not a

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and its ambassador accredited within this country.

*Id.* Additionally, Judge Newman observed that under the majority’s view, New York common law required that the bank exercise a duty of inquiry to the principal foreign state. *See id.* He argued that foreign states would not appreciate such an inquiry from a U.S. vendor. *See id.*

<sup>108</sup> *Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1282 (11th Cir. 1999). The court noted that “this action [ ] made its way through the courts of three jurisdictions: the United States, the State of Florida, and the Republic of Ecuador.” *Id.*

<sup>109</sup> *See id.* at 1293.

<sup>110</sup> *Id.*

<sup>111</sup> *See id.*

<sup>112</sup> 462 U.S. 611 (1983).

<sup>113</sup> *Id.* at 622 n.11.

question of liability.<sup>114</sup> This argument comports logically with the Supreme Court's ruling in *First National* and with the Second Circuit's application of state law in *First Fidelity*.<sup>115</sup> In *First Fidelity*, the Second Circuit determined whether Antigua & Barbuda, as a principal, was liable for the actions of the ambassador, its agent.<sup>116</sup> In *Aquamar*, amenability to the lawsuit, rather than liability in the lawsuit, was the factual inquiry.<sup>117</sup>

Had the Eleventh Circuit ruled that state law was controlling in this matter, an element of legal unpredictability, associated with the varying substantive laws of the fifty states, would ensure difficult and confused relations between foreign sovereigns and the U.S. judiciary.<sup>118</sup> By choosing federal law, the court enables foreign consulates and their ambassadors to rely on a "uniform" body of jurisprudence, which satisfies the essential goal of the Foreign Sovereign Immunities Act.<sup>119</sup> Indeed, commentators have argued that the United States as a whole has a "federal interest" in the application of a uniform set of choice of law rules that reflect U.S. understanding of international jurisdiction.<sup>120</sup> By choosing to apply federal choice-of-law rules to the express waiver issue, the Eleventh Circuit has bolstered the policies underlying the FSIA itself and planted a signpost for other circuits faced with like

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<sup>114</sup> See *Aquamar*, 179 F.3d at 1293-94. The court noted that "[a] section 1605(a)(1) waiver inquiry . . . does not require the court to determine the extent or existence of the sovereign's liability; the court need only decide the preliminary question of whether the sovereign is amenable to suit." *Id.* at 1294 n.36. This statement is consistent with other rulings on the issue of whether state or federal law applies to non-liability FSIA questions. See, e.g., *Hercaire Int'l, Inc. v. Argentina*, 821 F.2d 559, 563-65 (11th Cir. 1987) (holding that a federal standard applies to the determination of the scope of an express waiver); *Skeen v. Federative Republic of Brazil*, 566 F.Supp. 1414, 1417 (D.D.C. 1983) (holding that "as a general rule, only the purely federal question of sovereign immunity is to be decided on the basis of federal law"). But see *Liu v. P.R.C.*, 892 F.2d 1419 (9th Cir. 1989), *cert. denied*, 497 U.S. 1058 (1990) (applying state common law in suit between widow of Taiwanese historian and Republic of China for wrongful death and damages).

<sup>115</sup> See *First Fidelity Bank, N.A. v. The Gov't of Antigua & Barbuda—Permanent Mission*, 877 F.2d 189, 192 (2d Cir. 1989); see also *supra* notes 92-106 and accompanying text.

<sup>116</sup> See *First Fidelity*, 887 F.2d at 192.

<sup>117</sup> See *Aquamar*, 179 F.3d at 1294.

<sup>118</sup> See BORN, *supra* note 92, at 622.

<sup>119</sup> *Id.* at 683.

<sup>120</sup> *Id.*

circumstances.

*B. Whether Ambassador Teran had the Authority To Waive PNB's Immunity Under the FSIA*

The Eleventh Circuit applied a federal standard to analyze Ambassador Teran's authority to waive PNB's immunity.<sup>121</sup> First, the court turned to international law to ascertain the meaning of the FSIA waiver provision.<sup>122</sup> In part, the decision was premised on the district court's assumption that foreign sovereigns might be encouraged to apply their own laws to ambassadorial representations if decisions in these matters were to be based solely on U.S. law.<sup>123</sup> The court focused its examination of international law on a number of sources that suggest "a sovereign's chief diplomatic representative to a foreign nation possesses an extraordinary role and powers."<sup>124</sup> Since *Aquamar* is the first case to give significant treatment to the U.S. interpretation of ambassadorial powers to waive immunity, the court drew an analogy to numerous U.S. decisions that presume ambassadors have authority to represent their foreign states in legal proceedings.<sup>125</sup> On this basis, the Eleventh Circuit overtly extended that presumption of authority to include the power of an ambassador to waive sovereign immunity.<sup>126</sup> Next, the court set forth the rule that "under the FSIA, courts should assume that an ambassador possesses the authority to appear before them and waive sovereign immunity absent compelling evidence making it

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<sup>121</sup> See *Aquamar*, 179 F.3d at 1289.

<sup>122</sup> See *id.* at 1294; see also *supra* notes 45-50 and accompanying text (explaining the court's reason for applying international law).

<sup>123</sup> See *Aquamar*, 179 F.3d at 294 n.39. Deference to international law necessarily symbolizes deference to the sovereignty and particular interests of foreign states; however, some foreign countries may not choose to characterize the authority of American ambassadors according to an international legal standard, if such a standard exists. For example, Country X may not allow U.S. diplomats to perform certain tasks in X's judicial system.

<sup>124</sup> *Id.* at 1295.

<sup>125</sup> See *id.* at 1297 (citing nine cases involving, to a lesser extent, the scope of authority of foreign ambassadors involved in U.S. legal proceedings).

<sup>126</sup> See *id.* Given their broadest possible interpretation, the cases cited by the court still fail to stand for the proposition offered by the Eleventh Circuit in this particular case—that an ambassador is presumed to have the ability to effectuate a waiver of sovereign immunity. See *id.*

'obvious' that he or she does not."<sup>127</sup>

Once more, turning to the Second Circuit's decision in *First Fidelity* for comparison, the court concluded that, unlike the ambassador in *First Fidelity*,<sup>128</sup> Ambassador Teran acted with the requisite authority of his government and therefore effectuated a proper waiver of PNB's sovereign immunity.<sup>129</sup> The Eleventh Circuit, however, did not offer further explanation of what constitutes 'compelling evidence' for the purposes of establishing that an ambassador does not have the authority to waive his or her sovereign's immunity.<sup>130</sup> Instead, the court depended on the affidavit of Ecuadoran president Duran Ballen to support its conclusion that Ambassador Teran had the authority to waive PNB's immunity.<sup>131</sup> In light of the court's refusal to inquire into Ecuadoran law,<sup>132</sup> this reliance on the affidavit of a president has the subtle implication of giving far too much weight to the executive branch of a foreign country.

The court did note that the FSIA does not prohibit a foreign state from waiving its immunity for strategic advantage.<sup>133</sup> However, the Eleventh Circuit failed to recognize that this gives rise to potential abuse of the waiver provision. A foreign government might waive its immunity intending to win a forum non conveniens motion, with the knowledge that the case might

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<sup>127</sup> *Id.* at 1299. The court found one example of such compelling evidence in its "review of international law support[ing] the conclusion that an ambassador's statements may so plainly contradict the position of his sovereign that they do not bind the sovereign." *Id.*

<sup>128</sup> See *First Fidelity Bank N.A. v. The Gov't of Antigua & Barbuda—Permanent Mission*, 877 F.2d 189 (2d Cir. 1989).

<sup>129</sup> See *Aquamar*, 179 F.3d at 1289.

<sup>130</sup> See *id.*

<sup>131</sup> See *id.* at 1300.

<sup>132</sup> See *id.* at 1298.

<sup>133</sup> See *id.* at 1293. The court stated that:

Nothing in the FSIA prohibits a foreign sovereign from effecting a waiver of immunity for strategic purposes. The courts need not approve the reasons underlying a foreign state's waiver of its immunity; indeed, to second-guess motivations and litigation strategy might signal a disrespect for a sovereign's autonomy that is at odds with the policies underlying the FSIA.

*Id.*

then be remanded to its own local courts.<sup>134</sup> In the *Aquamar* case, the Ecuadoran courts refused to accept the case after it was remanded to their courts by the federal district judge, leaving the matter "in an odd limbo."<sup>135</sup> This fact calls into question the veracity of Teran's statement that environmental affairs should be decided in Ecuador and with it President Ballen's subsequent ratification. The liability of PNB—an arm of the Ecuadoran government—to the defendants certainly appears as a likely motivation.<sup>136</sup>

In response, the Eleventh Circuit stated that an investigation into a foreign ambassador's authority to perform diplomatic tasks contravenes the "separation of powers" principle—"[t]he question who represents and acts for a foreign sovereign or nation in its relations with the United States is determined, not by the judicial department, but exclusively by the political branch of the government."<sup>137</sup>

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<sup>134</sup> See BORN, *supra* note 92, at 623. A sovereign might escape liability completely if on remand to its own courts, those courts refuse to hear a case. See *id.*

<sup>135</sup> *Aquamar*, 179 F.3d at 1288.

<sup>136</sup> The Ecuadoran government has previously found itself in awkward legal situations. See *Aquinda v. Texaco, Inc.*, 175 F.R.D. 50 (S.D.N.Y. 1997). In *Aquinda*, the Republic of Ecuador—and its entity, PetroEcuador—fought for nearly three years to avoid liability to Texaco, Inc. as a third-party defendant by arguing for dismissal on the grounds of "international comity." *Id.* at 51. After the district court finally dismissed the complaint against the Republic, the government made a motion to intervene in the litigation—citing an electoral change as the reason for wanting to assist the plaintiffs. See *id.* In denying the motion to intervene, the court commented that "[f]inality in litigation and the orderly administration of justice would be rendered a mockery and a sham if electoral changes and accompanying shifts in viewpoint could of themselves justify renunciations of formal positions previously taken with the Court." *Id.*

<sup>137</sup> *Aquamar*, 179 F.3d at 1298 (quoting *Agency of Canadian Car & Foundry Co. v. American Can Co.*, 258 F. 363, 368 (2d Cir. 1919)). The court's reliance on this case is dubious. The world is far more globally connected than it was in 1919, and globalization has caused a tremendous influx of litigation involving foreign clients into the U.S. court system. See BORN, *supra* note 92, at 4. Therefore, the judiciary has been charged with greater responsibilities in the area of foreign relations. See *id.* at 11. In part, this trend was acknowledged by the enactment of the FSIA in 1976, which transferred the power to decide issues of sovereign immunity from the executive to the judicial branch. See *supra* notes 55-66 and accompanying text.

*C. Why not Fully Examine Ecuadoran Law to Ascertain Whether Ambassador Teran had Authority to Waive PNB's Immunity?*

The federal district court and the Eleventh Circuit Court of Appeals diverged sharply on the issue of which law—U.S. or Ecuadoran—should apply to Ambassador Teran's purported waiver of PNB's immunity.<sup>138</sup> The district court attempted to "become informed of the relevant provisions of Ecuadoran law [so as to] determine precisely what [was] required for an effective waiver of sovereign immunity under that law."<sup>139</sup> After recognizing its "diligent effort," the Eleventh Circuit went on to reject the district court's foray into Ecuadoran law.<sup>140</sup> The court reasoned that requiring courts to analyze foreign law would conflict with the policies of the FSIA and its waiver provision, cause "lengthy [and] unpredictable" litigation,<sup>141</sup> and increase the number of "potentially intrusive and resented inquiries of foreign governments."<sup>142</sup> These fears are certainly rational as judges and lawyers practicing in the United States cannot and should not be expected to know the laws of a foreign country.<sup>143</sup> Furthermore, it is possible that a party opposed to the presence of a foreign sovereign might be able to convince a court to "deny it the opportunity to appear and defend on the ground that it is prohibited from doing so under its own law."<sup>144</sup>

What if, under the laws of a certain country, an ambassador is explicitly barred from waiving sovereign immunity? How could a court follow the Eleventh Circuit's "bright line" rule—that dismisses foreign law—without infringing on that country's sovereign right to enact its own controlling legislation? Keep in

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<sup>138</sup> See *Aquamar*, 179 F.3d at 1293.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 1298.

<sup>142</sup> *Id.* (quoting *First Fidelity Bank, N.A. v. Gov't. of Antigua & Barbuda—Permanent Mission*, 877 F.2d 189, 199 (2d Cir. 1989) (Newman, J., dissenting)).

<sup>143</sup> Joseph Story observed that it would "annihilate the sovereignty and equality" of states if they were compelled to apply foreign law. J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 32 (2d ed. 1841).

<sup>144</sup> George Kahale III, *State Loan Transactions: Foreign Law Restrictions on Waivers of Immunity and Submissions to Jurisdiction*, 37 BUS. LAW 1549, 1561 n.70 (1982).

mind that U.S. governmental power is, unlike that in many other nations, because it is divided "among . . . a federal authority and its constituent territorial units."<sup>145</sup> A better rule might recognize this difference, and account for a foreign government's structure by examining more closely those instances in which an ambassador's actions are entirely circumscribed by his or her local law.<sup>146</sup>

## V. Conclusion

With the Eleventh Circuit's decision in *Aquamar S.A. v. Del Monte Fresh Produce S.A.*, the extent of ambassadorial powers under the express waiver provision of the FSIA has been given initial treatment and definition.<sup>147</sup> Perhaps more significantly, the court used a hybrid of federal and international law to reach its conclusion and, in so doing, sided strongly against the application of foreign law.<sup>148</sup> The Eleventh Circuit's analysis displayed at least some ignorance of those situations in which a foreign country's legislation expressly prohibits their ambassadors from waiving sovereign immunity. Ultimately, the Eleventh Circuit's analysis has compromised the foreign policy of these sovereign states.<sup>149</sup>

ADAM F. HULBIG

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<sup>145</sup> Sandra Engle, Note, *Choosing Law for Attributing Liability Under the Foreign Sovereign Immunities Act: A Proposal for Uniformity*, 15 FORDHAM INT'L L.J. 1060, 1096 (1992).

<sup>146</sup> "[I]t would be wholly incompatible with the equality and exclusiveness of the sovereignty of all nations, that any one nation should be at liberty to regulate either persons or things not within its own territory." STORY, *supra* note 143, § 20.

<sup>147</sup> See *supra* notes 108-46 and accompanying text.

<sup>148</sup> See *supra* notes 138-46 and accompanying text.

<sup>149</sup> Interestingly, the Eleventh Circuit gives no indication that an ambassador would be required to produce the written or oral approval of his or her government. In this case, it just so happened that the President of Ecuador ratified the ambassador's conduct. See *Aquamar S.A. v. Del Monte Fresh Produce N.A.*, 179 F.3d 1279, 1300 (11th Cir. 1999). Under the *Aquamar* decision, it is conceivable that an ambassador could operate contrary to the interests of his or her government—and according to those of a particular political faction—while subsequently passing undetected through the lens of the court.